

**NOT FOR PUBLICATION**

**SEP 20 2004**

**UNITED STATES COURT OF APPEALS**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

JOHN DANIEL,

Defendant - Appellee.

No. 03-50195

D.C. No. CR-02-00680-RMT

ORDER\*

Appeal from the United States District Court  
for the Central District of California  
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted September 15, 2004  
Pasadena, California

Before: THOMPSON, SILVERMAN, and WARDLAW, Circuit Judges.

John Daniel pleaded guilty to one count of being a felon in possession of a firearm and received a sentence of thirty-four months. In imposing this sentence, the district court granted a twelve-month downward departure based on its finding

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

that Daniel had attempted to rid himself of the firearm before being apprehended by police.

On the record as it stands, Daniel's conduct does not amount to the atypical case necessary to take him outside the heartland of the guidelines for felon in possession cases. The record does reflect that the district court failed to give the parties advanced notice of its intent to depart on this basis, *see* Fed. R. Crim. P. 32(h); accordingly, Daniel cannot be faulted for having failed to present evidence to warrant the departure. We vacate the sentence and remand for resentencing.

On resentencing, the district court shall not be bound by 18 U.S.C. § 3742(g)(2) because Daniel's original sentence was imposed prior to the effective date of the PROTECT Act, 18 U.S.C. 3742, and the requirement that the district court include a written statement of reasons now mandated by 18 U.S.C. § 3553(c)).

**VACATED** and **REMANDED** for resentencing.